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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1740

LUBBOCK POSTER COMPANY,
Petitioner,

v.

THE CITY OF LUBBOCK, TEXAS, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals
For The Seventh Supreme Judicial District of Texas

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May 22, 1979

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No.

LUBBOCK POSTER COMPANY,
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THE CITY OF LUBBOCK, TEXAS, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals
For The Seventh Supreme Judicial District of Texas

To The United States Supreme Court:

Petitioner, LUBBOCK POSTER COMPANY, respectfully submits this petition for writ of certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, Amarillo, Texas, to review the rendition of judgment in favor of respondents, THE CITY OF LUBBOCK, TEXAS (including its zoning officials) and THE ATTORNEY GENERAL OF TEXAS, which judgment the Supreme Court of Texas refused to review.

For clarity, reference to the parties is by the proper names of "Lubbock Poster" and the "City," with the latter reference including all respondents.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex.Civ.App.—Amarillo 1978, writ ref'd n.r.e.), is appended (APPENDIX A, pp. 4-22).

JURISDICTION

The Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, Amarillo, Texas, rendered its judgment and issued its opinion on July 24, 1978 (APPENDIX A, p. 4-24). The court of civil appeals overruled Lubbock Poster's motion for rehearing on August 21, 1978. A duly filed application for writ of error to the Supreme Court of Texas was refused, no reversible error, on January 17, 1979 (APPENDIX A, p. 24). A duly filed motion for rehearing to the Supreme Court of Texas was overruled on February 21, 1979 (APPENDIX A, p. 25). The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the federal highway beautification act, 23 U.S.C. §131, as amended in 1978, require a declaration that the respondent City must actually pay for removal by amortization of billboards on primary or interstate highways within Lubbock or else subject the State of Texas to a 10% penalty of its federal highway funds?

2. Does the Fifth Amendment's requirements of "due process" and "just compensation" prohibit a "taking" by amortization of billboards with a 25-year life span by a six and one-half year amortization period permitting only recovery of capital investments?

STATUTORY, CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

Statutory

Title 23 U.S.C. §131(g) and (k), as amended by the "Surface Transportation Assistance Act of 1978," 92 STAT. 2689, provide in their pertinent parts:

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law *and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section.* * * * Such compensation shall be paid for the following:
>
> (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; * * *.
>
> * * *
>
> (k) *Subject to compliance with subsection (g) of this section for the payment of just compensation,* nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section. (Emphasis added to indicate language added by the 1978 amendments.)

Constitutional

U.S. CONST., Amend. V, provides in its pertinent parts:

> No person shall * * * be deprived * * * of property without due process of law; nor shall private property be taken for public use without just compensation.

Ordinance

Ordinance 7084, The Code of Ordinances, City of Lubbock, Texas, Vol. IB, provides in its pertinent parts:

23.6 NONCONFORMING SIGN ABATEMENT

23.6-1 All signs * * * which are in violation of Section 23 on the effective date of this ordinance shall become nonconforming and shall be brought into compliance or removed by January 1, 1982. (Vol. IB, p. 668.20)

SECTION 24. NONCONFORMING BUILDINGS AND USES

The lawful use of any building, structure or land save and except signs and billboards existing at the time of enactment of this ordinance may be continued * * *. (Vol. IB, p. 668.26.2)

24.4 NONCONFORMING SIGNS OR BILLBOARDS

All signs or billboards which become nonconforming on the effective date of this ordinance shall be brought into compliance or removed by January 1, 1982 * * *. (Vol. IB, p. 668.26.5)

STATEMENT OF THE CASE

Proceedings and Results

This is a declaratory judgment case testing the validity of a comprehensive zoning ordinance. Lubbock Poster, as plaintiff, sued the City of Lubbock, its zoning officials and the attorney general, as defendants,[1] to declare invalid a zoning ordinance

[1] James R. Bertram and Jerrel D. Northcutt are the zoning officials in question. The Attorney General of Texas was named as a defendant to comply with TEX.REV.CIV.STAT.ANN. art. 2524-1 §11 (1965), because of the effect on the State of Texas under the federal highway beautification act, 23 U.S.C. §131, or the state highway beautification act, TEX.REV.CIV.STAT. ANN. art. 6674v-1 (1977).

which Lubbock Poster alleged destroyed its business under the guise of attempting to regulate billboards (APPENDIX B, pp. 1-3).

Lubbock Poster pled a number of constitutional attacks, including a taking of property without just compensation in violation of U.S. CONST., Amend. V (APPENDIX B, pp. 3-7, 9-10). Lubbock Poster also alleged that the federal highway beautification act, 23 U.S.C. §131, required the City to either actually pay just compensation for removal of billboards or subject the State of Texas to a 10% loss in federal highway funding (APPENDIX B, pp. 7-9). The City answered by denying any constitutional or statutory invalidity.

The case was tried without a jury (APPENDIX A, p. 1). The district court entered judgment declaring the ordinance in part constitutionally void, because the ordinance destroyed Lubbock Poster and the six and one-half year amortization period was unreasonably short (APPENDIX A, pp. 1-3). The district court denied any declaratory relief requested under the federal highway beautification act or the Fifth Amendment.

Both Lubbock Poster and the City appealed to the court of civil appeals. By appropriate points and counterpoints, Lubbock Poster continued to urge the application of the federal highway beautification act and the invalidity of the ordinance based on a Fifth Amendment taking (APPENDIX B, pp. 10-11). The court of civil appeals reversed that part of the judgment in favor of Lubbock Poster and affirmed that part in favor of the City, *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex.Civ.App.—Amarillo 1978, writ ref'd n.r.e.) (APPENDIX A, pp. 4-22).

Lubbock Poster then timely appealed to the Supreme Court of Texas, again urging the highway beautification act and the Fifth Amendment arguments (APPENDIX B, pp. 11-13).

Lubbock Poster's application for writ of error to the Supreme Court of Texas was refused, no reversible error (APPENDIX A, p. 24). Following the overruling of its motion for rehearing before the Supreme Court of Texas (APPENDIX A, p. 25), Lubbock Poster timely files this petition for writ of certiorari for consideration by this court.

Fact Statement

The contest here is the validity *vel non* of a comprehensive zoning ordinance passed by the City (F/F 18).[2] The ordinance in issue is Ordinance 7084, the pertinent parts of which are stated, *supra*, pages 3-4. Effective July 19, 1975, the city council of the City adopted the ordinance (F/F 20). The ordinance regulates placement of outdoor advertising displays (billboards) throughout Lubbock (F/F 127). The ordinance requires the removal by January 1, 1982, of all existing billboards which are made nonconforming by the ordinance and which are not conformed by that date (F/F 102, 113, 127-28). The ordinance requires the removal of the billboards without compensation by the City and at the owner's expense (F/F 102, 113, 127).

The billboard section of the ordinance principally affects Lubbock Poster (F/F 128, 134). Lubbock Poster engages in the outdoor advertising business in Lubbock (F/F 103) and owns substantially all the billboards in Lubbock (F/F 134). Lubbock Poster has engaged in that business for over 64 years (F/F 103). On May 1, 1976, shortly before the trial, Lubbock Poster

[2]The parties requested and the district court made numerous findings of fact. Where the district court made a finding of fact which was not questioned on appeal, the undisputed nature of that fact is shown by the reference to the finding. Although the findings are not appended to this brief, references should aid to indicate the undisputed underlying factual basis for the legal arguments to follow. Any dispute in the facts is so indicated.

owned in Lubbock proper 285 billboards situated on 162 locations (F/F 104). The fair market value of the 285 billboards was $796,000 (F/F 110). All of the billboards were legally erected in compliance with state and local laws, including the prior zoning ordinance (F/F 105).

Of the 285 billboards in existence at the date of trial, only *two* conformed to the requirements of the ordinance (F/F 128). The remaining 283 billboards did not conform to the ordinance (F/F 128). Of the nonconforming billboards, Lubbock Poster claimed and the district court found that only 36 could be conformed (F/F 128). The City disputed this, asserting that 66 billboards could be conformed. The City disputed this finding in the court of civil appeals, but the opinion below makes no express resolution of the dispute, although the opinion impliedly favors the City.

Nevertheless, even under the City's evidence, 217 billboards do not conform and cannot be conformed. The fair market value of the billboards Lubbock Poster believed to be nonconformable totaled $710,000 (F/F 139), which would cost $132,000 to remove (F/F 140). Without regard to the exact number of conformable billboards, Lubbock Poster is required, at a substantial expense to it, to remove the nonconforming billboards in a little over six years.

The billboards have an average remaining useful, income-producing life in excess of 25 years (Add.F/F 1). In fact, the undisputed evidence shows a "life expectancy" of 30 years. Of course, not all billboards remain in place for their full life expectancy; other than five billboards that Lubbock Poster owns, the sites are leased for a primary term of three years (F/F 119). Some 20% or less of the "inventory" of the billboards change each year (F/F 120).

The yearly attrition factor does not mean that all billboards are replaced every five years. In fact, one exhibit shows the exact length of time each site location has been leased (Px-1). As demonstrated by that exhibit, as of the effective date of the ordinance, 95% of the billboards had been in place for one year, 75% of the billboards had been in place three years and 61% of the billboards had been in place for at least six years. In addition, 58% of the billboards had been in the same location for periods in excess of the amortization period. The exhibit also shows a number of billboards that had been there in excess of 30 years.

A substantial number of the nonconformable billboards are subject to the federal highway beautification act.[3] Two exhibits indicate the exact number of billboards on primary or interstate federal highways. (Px-1 lists all Lubbock Poster locations and the number of billboards at each location; Px-37 lists the locations subject to the act.) As shown by the exhibits, 190 billboards at 107 locations are subject to the federal highway beautification act. The exact number of billboards that remain at the end of the amortization period cannot be known until the end of the period. Whatever the number of the nonconformable billboards, that number must be removed at the end of the amortization period without compensation (F/F 113, 127).

[3]All of the billboards are located within 660 feet of the highway right-of-way. Thus, the billboards located on primary or interstate highways within Lubbock come within the prohibition of the federal highway beautification act, 23 U.S.C. §131(c).

ARGUMENTS

I. REMOVAL OF BILLBOARDS BY ZONING AMORTIZATION CANNOT CONSTITUTE "JUST COMPENSATION" UNDER THE FEDERAL HIGHWAY BEAUTIFICATION ACT, 23 U.S.C. §131, AS AMENDED IN 1978, WHERE BILLBOARDS ARE REMOVED WITHOUT PAYMENT AT THE END OF THE AMORTIZATION PERIOD BECAUSE THE ACT REQUIRES ACTUAL PAYMENT.

A. Why certiorari should be granted: A state court has decided a federal question not determined by this court.

Certiorari should be granted, because a state court has decided a federal question of substance not previously determined by this court. The courts below were asked to declare the rights of Lubbock Poster and how those rights are affected by the zoning ordinance. As a part of that declaratory relief, Lubbock Poster always sought a declaration of the application of the federal highway beautification act, 23 U.S.C. §131, to its billboards. Lubbock Poster now asks this court for such a declaration.

To date, no declaration of Lubbock Poster's rights has been made, except for three conclusions of law by the district court and two paragraphs in the opinion below, *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 945 (Tex.Civ.App.—Amarillo 1978, writ ref'd n.r.e.). In both instances, the courts only said that, since the statute did not preempt stricter control by ordinance, no conflict exists between the ordinance and the statute. Both attempts fail to deal with the precise request for declaratory relief, which has now been made even more compelling by the 1978 amendments to 23 U.S.C. §131. The amendments demonstrate that not only has a state court

decided a federal question which this court has never decided, but also that the state court incorrectly decided the federal question.

To appreciate the impact of these amendments first requires a look at the prior law. As originally enacted, and as last amended in 1975, 23 U.S.C. §131(b) commands that each state must enact laws providing for "effective control" of billboards or else be subject to a 10% penalty of federal highway funds. To provide an inducement for "effective control," §131(g) requires compensation. Prior to the recent amendments, §131(g) read:

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State Law * * *.

Standing alone, this §131(g) mandates compensation for owners of signs.

Section 131(g), however, was never considered alone, because of the presence of §131(k). That subsection (k), from its original enactment until the 1978 amendment, read:

> (k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

It was this subsection (k) that permitted cities and states to argue that where stricter limitations were imposed, even those requiring removal, no compensation was required, because the police powers of the state were left intact.

The courts apparently accepted such an argument, as illustrated by *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977); *Markham Advertising Co. v. State*, 73 Wash.2d 405, 439 P.2d 248 (1968),

appeal dism'd, 393 U.S. 316 (1969); and *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). It is now that very argument which the recent amendments not only expressly reject but, in addition, make plain that it was never the intent of Congress.

B. The meaning of the legislative history: The City must now pay just compensation or subject Texas to a 10% loss of federal highway funds.

The 1978 amendments demonstrate the intent of Congress and bring into sharp focus the failure of the courts to ever address the proper issue. Simply stated, the amendments, together with the legislative history, show that compensation is as much required for a removal by ordinance as by state action. As a consequence, a removal by amortization — even if a valid exercise of police power — cannot comply with the command of 23 U.S.C. §131 to actually pay "just compensation upon removal," where billboards actually remain and are removed at the end of the amortization period. Unless now so declared, the opinion below stands contrary to congressional intent.

The development of this argument requires a full look at the amendments and the legislative history. What once may have been in doubt has now been conclusively answered by Congress. With recent amendments to 23 U.S.C. §131, the Congress has now made clear, without regard to the doctrine of preemption, that either compensation must be paid for billboard removal — even if removed by zoning ordinance — or Texas will lose 10% of its federal highway funds.[4]

On October 14, 1978, Congress amended 23 U.S.C. §131. That act was signed into law by President Carter on November

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[4]Lubbock Poster and the City (including the attorney general) stipulated that such a penalty ranges from $24,000,000 to $35,000,000.

6, 1978. These amendments are contained in the "Surface Transportation Assistance Act of 1978," 92 STAT. 2689. The relevant portions of that act as it amended 23 U.S.C. §131 are quoted, *supra*, page 3. To indicate the impact of the amendments, Lubbock Poster also appends the report of the House Committee on Public Works and Transportation, HOUSE REPT. 1485, 95TH CONG., 2ND SESS., pp. 14-17 (APPENDIX C, pp. 1-7). In addition, Lubbock Poster directs the court's attention to the relevant portions of the House floor debates (not appended; *see* CONG.R. H10514-18, Sept. 22, 1978).

The requirement for compensation, both now and always, follows from a review of the amendments and the legislative history. As previously indicated, *supra*, page 3, and repeated now for clarity, §131(g) and (k) were amended to read:

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law *and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section.*
>
> * * *
>
> (k) *Subject to compliance with subsection (g) of this section for the payment of just compensation*, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section. (Emphasis added to indicate the language added by the 1978 amendments.)

Focusing on the added words demonstrates the requirement for compensation in all situtations. Just compensation is

required "whether or not removed pursuant to or because of this section." Thus, subsection (g) mandates just compensation without regard to the reason for removal. Should doubt exist as to the requirement for payment, the amendment to subsection (k) eliminates any question. As amended, that subsection permits a state to establish standards imposing stricter limitations but only "(s)ubject to * * * payment of just compensation." These amendments now compel a declaration of payment or the subjection of the state to the 10% penalty.

The action by both houses of Congress demonstrates the congressional intent. Separate bills were introduced in both the House and the Senate to amend 23 U.S.C. §131, *et seq.* The House passed as its amendments the quoted text of subsections (g) and (k) as a part of the "Surface Transportation Assistance Act of 1978," 92 STAT. 2689, together with an immaterial change in subsection (o). The Senate passed a slightly different bill, thereby requiring resolution of the differences by a joint conference committee of both houses.

The bill passed by the House was a bill enacted by the whole Congress (following conference committee action) and signed into law by President Carter, other than a change made to subsection (o) in the conference committee. The adoption of the House committee report, HOUSE REPT. 1485, is shown by the pertinent parts of the appended House and Senate Conference Report, HOUSE REPT. 1797, 95TH CONG., 2ND SESS., pp. 1, 14, 91 (APPENDIX C, pp. 7-10). With the exception of the language applicable to subsection (o), the House report, HOUSE REPT. 1485, constitutes the legislative history and demonstrates the intent of Congress.

While reproduced by appendix in all of its pertinent parts, the key language of HOUSE REPT. 1485, pp. 14-15, is again included for emphasis:

Subsections (a) and (b)[5] * * * would clarify existing law to make sure that just compensation is paid upon removal of *any lawfully* erected sign which does not conform with the requirements for "effective control" under the Highway Beautification Act.

When Congress enacted the Highway Beautification Act of 1965, one of the major issues was whether nonconforming outdoor advertising signs should be removed by the exercise of police power or by payment of just compensation. This matter was debated at length and the Congress decided that just compensation should be paid, rather than removing signs by police power without payment. * * *

Although Congress made clear its intent that just compensation would be paid for the removal of all lawfully erected signs which are nonconforming under the Highway Beautification Act, this has not been the case. * * *

* * * *The employment of* State or local general *zoning* laws or *ordinances to remove lawfully erected signs* that are nonconforming under the Highway Beautification Act, *without the payment of just compensation, is an obvious circumvention of the compensation requirements of the law.* Whether signs are removed under State or local ordinances, the result is the same. Local political subdivisions of a State receive their powers from the State

[5]Subsection (a) of the amendatory act amended 23 U.S.C. §131(g), while subsection (b) amended 23 U.S.C. §131(k).

* * *, and or the acts of the subdivisions are the acts of the State. *The State should not be able to avoid payment of just compensation by waiting for local political subdivisions to remove nonconforming signs under general ordinances.* (Emphasis added.)

This House report, together with the House floor debates, therefore, shows that compensation is required.

Indeed, this legislative history, together with the amendments, also interprets the original intent of Congress. Such a legislative interpretation of previously passed legislation constitutes a proper tool for present construction. A court may use an amendatory act to arrive at the intention of the congressional body in a previous act. The rule is particularly apropos on congressional legislation. Subsequent legislation by a later Congress in declaring the intent of an earlier statute is entitled to significant weight. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); and *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84 (1958). Therefore, settled principles of construction mandate reliance upon subsequent legislative interpretation of the prior statutory language.

The "bottom line" becomes that the legislative history requires a declaration that the statute not only now but always has required compensation for billboard removal via a local zoning ordinance. As succinctly stated in HOUSE REPT. 1485, "The employment of * * * zoning ordinances to remove lawfully erected signs * * * without the payment of just compensation is an obvious circumvention * * * of the Federal law." Such clarity of legislative history now requires the requested declaratory relief.

C. The impact of the legislative history: 23 U.S.C. §131(g) and (k) require actual payment and reject amortization.

A proper declaration of the intent of Congress now permits its application. That application begins with a return to the exact language of 23 U.S.C. §131(g). That subsection expressly commands, "Just compensation shall be paid upon removal of any outdoor signs * * *." The four key words — paid, shall, compensation and just — considered in reverse order, apply the impact of the legislative history.

The first two key words, "paid" and "shall," can be considered together. The word "paid" proves, more than anything else, that actual payment must be made. Nothing in the legislative history of the original act or the amendments suggests anything less than actual payment. Indeed, the legislative history rejects amortization as payment. Following the adoption of the Federal Highway Beautification Act of 1965, amendments were advanced in the 90th Congress to make compensation permissive rather than mandatory. Amortization was expressly rejected by the House committee:

> Section 131(g) * * * of the Highway Beautification Act of 1965, clearly and unequivocally requires that just compensaton shall be paid upon the removal of certain specifically described outdoor advertising * * *. Other alternative methods of handling the compensation requirement, *including amortization*, were considered and rejected when the act was enacted. (Emphasis added.)
>
> HOUSE REPT. 713, 90TH CONG., 1ST SESS., p. 5.

Under such language, no doubt can remain that this act commands actual payment, not amortization. To this must be added the settled meaning of the word "shall," making the command for payment mandatory and not permissive.

The word "compensation" further mandates actual payment. Compensation can hardly mean anything less than actual dollars, not a substitute for money via amortization. Without doing substantial violence to the meaning of ordinary words, compensation in anything less than coin of the realm could hardly be paid. Even if amortization is a valid exercise of police power, amortization cannot be "paid" but can only substitute for compensation. Therefore, amortization can never be the compensation commanded by Congress.

The last word, "just," introduces the ultimate argument. Assuming, *arguendo*, that amortization could in some way substitute for actual payment, that substitution could never be just. Amortization is valid as a substitute for a taking only where the amortization period reasonably predicts the remaining useful life expectancy. For amortization to be a "just" compensation for payment, there must be no useful remaining life span at the time billboards are removed.

The command of 23 U.S.C. §131(g) is to pay upon removal. Under the facts here present, a substantial number of the 190 billboards subject to the act will be in place at the end of the amortization period, January 1, 1982. It is at that time that the removal of the billboards occurs. Such a removal under the ordinance without the actual payment of the compensaton necessarily violates the act. In short, where billboards with a remaining useful life span are removed, amortization can hardly square with congressional mandate of just compensation.

Certiorari should, therefore, be granted to decide a federal question of substance not previously considered by this court and a declaration made that the federal highway beautification act either here requires actual compensation for billboard removal or subjects Texas to the penalty.

II. AMORTIZATION CANNOT VALIDLY SUBSTITUTE FOR THE "JUST COMPENSATION" REQUIRED BY U.S. CONST., AMEND V, BECAUSE RECOVERY OF CAPITAL INVESTMENT CAN NEVER BE JUST WHERE A SUBSTANTIAL NUMBER OF BILLBOARDS WITH A 25-YEAR LIFE SPAN REMAIN AT THE END OF THE SIX AND ONE-HALF YEAR AMORTIZATION PERIOD.

Certiorari should also be granted, because a state court has approved a "taking" by amortization in violation of U.S. CONST., Amend. V. This court has not previously determined the constitutionality of a taking by amortization, and the decision below approves amortization, under the particular facts applicable here, in a way not in accord with the decisions of this court.

This argument begins with the definition of amortization. In theory, amortization only substitutes for a "taking." By terminating an otherwise protected use over a period of time sufficient that the owner, through the income produced from the property, may recover any loss in property value, amortization avoids the harshness of private losses. According to the advocates of amortization, the avoidance of private losses makes this exercise of the police power reasonable. As one author comments, KATARINIC, *Elimination of Non-Conforming Uses, Buildings, and Structures by Amortization—Concept v. Law*, 2 DUQUESNE UNIV.L.REV. 1 (1963):

> Stated in its simplest terms, amortization contemplates the compulsary termination of a non-conformity at the expiration of a specific period of time, which period is equal to the useful economic life of the non-conformity.

For a similar definition, *see* Note, 44 CORNELL L.Q. 450, 453 (1959).

In other words, the advocates of amortization say that by recoupment of any loss in property value, amortization in theory substitutes for "just compensation" under the Fifth Amendment. For amortization to substitute for just compensation, it must be based on a reasonable prediction of life span. This court has never expressly accepted or rejected such a theory of amortization. Lubbock Poster does not ask this court to reject the theory of amortization; rather, the theory of amortization, as here applied, constitutes a taking without due process under the Fifth Amendment. Under these facts, the six and one-half year prediction, Lubbock Poster submits, takes rather than substitutes.

Because this court has neither accepted or rejected this argument, its assertion is both short and simple. In essence, the useful, income-producing life span of the billboards far exceeds the six and one-half year amortization period and cannot therefore be a reasonable prediction. The district court found that the billboards have a life span in excess of 25 years. In fact, the undisputed evidence shows the life span to be 30 years.

Not every billboard has a 30-year life span. Except for five locations which Lubbock Poster owns in fee, the billboards are erected on property leased for a primary term of three years. While an annual attrition factor exists, an exhibit showing the actual date of leasing of each billboard site indicates the correct picture. As shown by that exhibit, as of the date of that ordinance, 95% of the billboards had been in place for a year, 75% in place for three years and 61% in place for six years. The majority of the leases are renewed from term-to-term, with the original lease date for a substantial number extending back to the late 1940's, the 1950's and the early 1960's.

These undisputed facts reject the six and one-half year predicted life span as reasonable. The City defended the amortization period, and the courts below accepted the period, on the basis that the future control of a nonconforming use is within the City's zoning power. Property protected by the Fifth Amendment, however, includes the right to use and enjoy property. *National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969); and *Buchanan v. Warley*, 245 U.S. 60 (1917). *Also see Fuentes v. Shevin*, 407 U.S. 67 (1972); *Lynch v. Household Financial Corp.*, 405 U.S. 538 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); and *Sniadach v. Family Financial Realty, Co.* 395 U.S. 337 (1969).

Thus, while a city has the right to control use of property by zoning, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), the exercise of the police power is not unlimited, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922). If the power were unlimited, then any city could, by ordinance, immediately terminate any legally existing nonconforming, nonhazardous use, simply by fiat, without any amortization period. Not even the City or the courts below argue that a nonconforming use may be immediately terminated without any time period, although the net effect of the opinion below, as later demonstrated, permits termination without any time period.

Despite the breadth of the opinion below, both the City and the courts below recognize that to pass constitutional muster, the length of the amortizaton period must be a reasonable prediction. It is the attempt to justify the six and one-half year period with which Lubbock Poster quarrels more than anything else. The exact quarrel is identified by the opinion below, *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 941-42

(Tex.Civ.App. — Amarillo 1978, writ ref'd n.r.e.), where the court enumerates the factors which, in its judgment, make the six and one-half year amortization period reasonable.

The court below holds a period reasonable, if the owner, during the period, can recover: (1) the capital investment in the structure (less the return of investment); and (2) the cost to remove the structure. The court also indicates that, in judging the length of the period necessary to recover these two cost factors, the life expectancy of the investment, as affected by attrition and lease rights, could be considered. In essence, the court holds that the owner need only be afforded a reasonable opportunity to recover the investments in the structure. Then, the court holds the period to be reasonable, because Lubbock Poster necessarily recovered its capital investment, since it has fully depreciated the billboards for income tax purposes.

In so holding, the court below violated the Fifth Amendment's commands of due process and just compensation. While a number of the billboards will disappear due to normal attrition, the evidence remains undisputed that at least 60% of the leased sites have been there longer than six years. Such strong evidence of constant renewal of leases must be taken into account. This court commanded as much in an eminent domain case involving structures on a lease premise. *Almota Farmers E. & W. Co. v. United States*, 409 U.S. 470 (1973). While the court below gives "lip service" to lease renewals, it ignores the evidence that a substantial and predictable number of billboards will have significant life expectancy remaining.

With billboards having a life span in excess of 25 years, it can be reasonably predicted that approximately 60% of the billboards will remain in place at the end of the amortizaton period. Then, the remaining billboards must come down. Why?

Lubbock Poster has depreciated the billboards and has recovered its capital investment. But, is this just compensation? Lubbock Poster submits that the destruction of 60% of its business on the basis of depreciation for income tax purposes can never be just or a proper exercise of police power.

A time period which permits only the recovery of capital investment based on income tax depreciation leaves a whole host of economic factors unrecovered. Obviously, a billboard with a 25-year life span has a substantial market value after six and one-half years, even though it may have been depreciated for tax purposes. Because of inflation, the actual capital value of a billboard structure may well have appreciated rather than depreciated. If the opinion below were correct, no amortization period would be needed at all for any structure fully depreciated at the date of the enactment of an ordinance, even though the full market value and many years of life expectancy remain.

Thus, what the opinion below permits is great feats of eminent domain under the guise of amortizing land use. Any structure, once depreciated or once its investment is recovered, could be terminated within a very short time period or no time period at all. It would make no difference that the structure would not be a nuisance or a hazard of any kind. The city could say that the use should be terminated because, in the city's judgment, a different use would better serve the public needs. True, the fee would not be taken, but a structure worth a substantial fair market value would come down, because the owner had recovered his original cost. Lubbock Poster submits that the impact is too great to be a valid exercise of police power.

Indeed, the magnitude of the impact is exactly the test enunciated last term in *Penn Central Transp. Co. v. New York*,

__U.S.__, 57 L.Ed.2d 631 (1978). There, the City of New York, by a zoning ordinance, prohibited a future use of Grand Central Station. While this court upheld the prohibition as within the police power, it defined the limits of the power, *Penn Central*, 57, L.Ed.2d at 652:

> In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *.

Then, this court applied the test with the following language, *Penn Central*, 57 L.Ed.2d at 655-56:

> We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it.]" Pensylvania Coal Co. v. Mahon, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel * * *.

Applying that language to the facts here present rejects the amortization period as reasonable. For every billboard that remains at the end of the amortization period, a potential of 20 years of income-producing life remains. Since 60% can be reasonably predicted as remaining, the impact on an individual "parcel" is devastating. Not only must the owner lose the fair market value and the income potential, he must also destroy the structure at his own expense. Such an impact cannot square with due process and just compensation.

In sum, if amortization substitutes for just compensation by reasonably predicting life span, the formula used here and the prediction fall far short. Therefore, the court should declare that, absent a reasonable prediction, the amortization period

here in question violates the Fifth Amendment and justifies the granting of the writ for certiorari.

CONCLUSION

For the reasons stated, the Supreme Court of the United States should grant the petition for certiorari to decide the federal questions not previously decided or incorrectly decided below, and then reverse the judgments below or, alternatively, affirm the judgment of the district court, with costs taxed to the respondent City.

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P.O. Box 2585
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Donald M. Hunt

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This petition for certiorari has been served on the respondent City of Lubbock by mailing three copies to its attorney of record, James P. Brewster, P.O. Box 2000, Lubbock, Texas, 79457; and served on the respondent attorney general by mailing three copies to the Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas, 78711, on May 18, 1979.

Of The Firm

APPENDIX A

JUDGMENT, OPINION AND DECREES BELOW

The Trial Court Judgment

NO. 80,794

LUBBOCK POSTER COMPANY

vs.

THE CITY OF LUBBOCK, ET AL

IN THE 140TH DISTRICT COURT
OF
LUBBOCK COUNTY, TEXAS

JUDGMENT

On the 24th day of May, 1976, the Court considered the above case in which LUBBOCK POSTER COMPANY (a partnership composed of Iva Edington and Homer L. Hensley) is Plaintiff, and THE CITY OF LUBBOCK, TEXAS, JAMES E. BERTRAM, JERREL D. NORTHCUTT, and JOHN L. HILL, in his capacity as Attorney General of the State of Texas, are all Defendants. Pursuant to due notice of setting for trial, the parties appeared in person or by authorized representatives and by their attorneys of record. A jury was waived and matters

of fact and law were submitted to the Court. The Court considered the pleadings, evidence and argument of counsel, following which the Court finds: (a) The validity and effect of Ordinance 7084, passed by The City of Lubbock, effective July 19, 1975, as it applies to billboards (including poster panels and painted bulletins), has been placed in issue for determination (as more fully stated in any findings of facts to be entered hereafter); (b) The amortization provisions of said Ordinance requiring existing billboards to be removed or brought into compliance on or before January 1, 1982, are unreasonably short and cause a greater burden to be placed upon Plaintiff than can be justified by any resulting benefits to the public generally and result in the virtual destruction of Plaintiff's business; (c) The said amortization provisions of said Ordinance are therefore unreasonable and constitutionally void for the reasons stated above; and (d) Any language of said Ordinance excepting billboards from nonconforming use regulations applicable to other noncomforming buildings, structures, and uses is likewise unreasonable and constitutionally void. Accordingly, the Court

ORDERS AND DECLARES:

(1) The provisions of Ordinance 7084, passed by the City of Lubbock, effective July 19, 1975, insofar as the said Ordinance requires all billboards (including poster panels and painted bulletins) in existence on July 19, 1975, to be brought into compliance or removed by January 1, 1982 (said provisions expressly including §§ 23.6-1 and 24.4 of said Ordinance) are unreasonable, unconstitutional and void for the reasons stated above;

(2) Any language of said Ordinance exempting all billboards existing on July 19, 1975 from nonconforming use regulations applicable to other nonconforming buildings, structures, and

uses is likewise unreasonable, unconstitutional and void;

(3) The City of Lubbock, Texas, James E. Bertram and Jerrel D. Northcutt (and their successors in office) are permanently enjoined form enforcing against plaintiff Lubbock Poster Company the provisions of said Ordinance declared unconstitutional by this judgment; and

(4) All relief not expressly granted is denied.

RENDERED, ENTERED AND ACTUALLY SIGNED on the 1st day of April, 1977.

/s/ William R. Shaver

Judge Presiding

(Tr. 61-62)

* * * * * * *

The Opinion Below

No. 8875

IN THE COURT OF CIVIL APPEALS

FOR THE SEVENTH SUPREME JUDICIAL DISTRICT

OF TEXAS, AT AMARILLO

JULY 24, 1978

LUBBOCK POSTER COMPANY, APPELLANT-APPELLEE

v.

THE CITY OF LUBBOCK, TEXAS, ET AL.,
APPELLANTS-APPELLEES

FROM THE DISTRICT COURT OF LUBBOCK COUNTY;
140TH JUDICIAL DISTRICT; NO. 80,794;
HONORABLE WILLIAM R. SHAVER, JUDGE

Lubbock Poster Company, a co-partnership composed of Iva Edington and Homer L. Hensley, brought this action against the City of Lubbock, its director of the planning division, and

its administrator of environmental control, challenging the constitutional validity of certain provisions of the City's comprehensive zoning ordinance. The ordinance regulates, *inter alia*, the location, proximity, size, separation and height of off-premise billboards.[1] The ordinance requires all existing billboards to either conform to the regulations or be removed at the end of a six and one-half year amortization period. Lubbock Poster Company also sought an injunction against the City and its officials to prohibit enforcement of these contested provisions of the ordinance. John L. Hill, the Attorney General of the State of Texas, is joined in the action under Section 11 of Article 2524-1 of the Revised Civil Statutes of Texas to represent the interest of the State against alleged violations of the Federal Highway Beautification Act. The non-jury trial resulted in the court declaring void only the nonconforming use and amortization provisions, enjoining the enforcement of these provisions and denying all other requested relief. From this judgment both parties appeal. Affirmed in part; reversed and rendered in part.

The City enacted the zoning ordinance to "promote and protect the health, safety, comfort, convenience, prosperity and general welfare of the citizens of Lubbock by assuring quality development, to allow for proper economic growth which conforms to a comprehensive plan of the city." Under the ordinance the City is divided into nineteen "zones or districts, restricting and regulating therein the location, erection, construction, reconstruction, alteration and use of

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[1]The ordinance defines billboards as "(a)ny structure or portion thereof upon which are outdoor advertising signs which advertise goods, products or services not related to goods, products or services sold on the premises on which the sign is located." Also, a "structure" is defined as "(a)nything constructed or erected which requires location on the ground or attached to something having a location on the ground."

buildings, structures and land for trade, industry, residence and other specified uses" and further "providing for the gradual elimination of nonconforming uses of land, buildings and structures."

The ordinance also provides that all signs or billboards which did not conform to the requirements of the ordinance on July 19, 1975 (the effective date of the ordinance), are nonconforming uses and "shall be brought into compliance or removed by January 1, 1982." Although other nonconforming uses of land may be continued within certain limitations and restrictions, signs and billboards are specifically excluded from the continuing use provisions of the ordinance.

Lubbock Poster Company asserts that the trial court erred in not declaring the entire billboard section of the ordinance void. The company contends the ordinance takes its property without compensation in violation of both the federal and state constitutions, and also asserts that the ordinance is an unreasonable exercise of municipal police powers. The City of Lubbock challenges the trial court's failure to uphold the amortization and nonconforming use provision and asserts the constitutionality of these provisions as a valid exercise of municipal police powers.

The validity of the ordinance is a question of law for the court and there are basic principles which we must consider in determining the issues presented by the parties. It has been long recognized that governing bodies of the cities have constitutional authority to promote the health, safety and general welfare by implementing comprehensive zoning ordinances. Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). Billboards and outdoor advertising are a proper subject for regulation under the state police power. Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (N.Y.

Ct.App. 1977); National Advertising Company v. County of Monterey, 1 Cal.3d 875, 464 P.2d 33, 83 Cal.Rptr. 577 (Cal. 1970), *cert. denied*, 398 U.S. 946.

In City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972), the Texas Supreme Court joined the prevailing view of outside jurisdictions by recognizing the "amortization" technique as a valid exercise of municipal police power to terminate nonconforming property uses. The *Benners* Court said "that such an enactment is subject to the same test of validity as other legislative acts i.e., whether it is reasonable and bears a fair relationship to the object sought to be obtained." If the ordinance passes constitutional muster as reasonable and bears a fair relationship to the object sought to be obtained, it does not constitute a "taking" of property in the eminent domain sense. Instead, it is a valid exercise of municipal police power. 485 S.W.2d at 777-78.

Lubbock Poster Company maintains that the sections of the ordinance regulating the location, proximity, size, separation, setback and height of billboards[2] bear no substantial relationship to the health, safety, morals and general welfare of the community and constitute an unreasonable exercise of

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[2]Billboards are permitted uses and may be located in three districts, which are the commercial "C-4", the light manufacturing "M-1" and the heavy manufacturing "M-2" zones. These three zoning districts are numerous and the same are geographically disbursed throughout the City of Lubbock.

Billboards located in the "C-4" districts must be "a minimum of eighty (80) feet from any residentially zoned property line" and may have a maximum area of "three hundred (300) square feet."

Billboards located in each of the three districts are required to conform to separation, setback and height requirements. A two hundred feet minimum separation between all billboards on the same side of a street is required, but this separation requirement increases to five hundred feet on expressways. The setback requirement is "forty-three (43) feet or the same distance of an adjacent building." If the billboard is located between two buildings, then it must setback "the same as that of the building which has the greatest setback from the property line." The maximum height of all billboards is limited to thirty-five feet.

municipal authority. More specifically, they say the mere existence of billboards neither promotes nor destroys morals; that there is no evidence that billboards cause traffic accidents; and that there is no evidence that billboards adversely affect the value of adjacent property.

The City counters that the ordinance is entitled to the presumption of validity which is applicable to other municipal legislation. The City further contends that Lubbock Poster, attacking the ordinance, has the burden of showing that no conclusive, debatable or issuable facts or conditions exist which would authorize the City to exercise the discretion confided in it by enacting these sections of the ordinance.

Because the ordinance is an exercise of the legislative power of the governing body of the City of Lubbock, the ordinance must be presumed to be valid, and the court cannot interfere unless it appears that these sections of the ordinance represent a clear abuse of municipal discretion. City of Waxahachie v. Watkins, 154 Tex. 206, 275 S.W.2d 477, 480 (1955); City of University Park v. Benners, *supra* at 779. Lubbock Poster has the "extraordinary burden...to show that no *conclusive* or even *controversial* or issuable, facts or conditions existed which would authorize the governing board of the municipality to exercise the discretion confided to it" by enacting these sections. City of Waxahachie v. Watkins, *supra* at 480-81; *see also* City of University Park v. Benners, *supra* at 779.

"If reasonable minds may differ as to whether or not a particular zoning restriction has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the restriction must stand as a valid exercise of the city's police power." City of Waxahachie v. Watkins, *supra* at 481. As stated by the court in *Watkins*, "If the issue of validity is fairly debatable, courts will not

interfere." *Id.* at 481. The United States Supreme Court employed the same standard in Village of Euclid v. Ambler Realty Company, *supra*, stating, "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388. *See also* Zahn v. Board of Public Works, 274 U.S. 325, 328, 71 L.Ed. 1074, 47 S.Ct. 594 (1927); *accord*, Moore v. City of East Cleveland, 431 U.S. 494, 514 n.1, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977) (concurring opinions stating that the standard remains viable).

After hearing disputed evidence the trial court found that the location, proximity, size, separation, setback and height provisions of the ordinance had a reasonable relationship to the public health, safety or general welfare. We are persuaded that each of these provisions presents "fairly debatable" issues concerning the relationship they bear to the public health, safety or the general welfare of the community.[3] The challenged provisions are reasonably calculated to aid in accomplishing the intended purposes of the ordinance.

We conclude that Lubbock Poster Company failed to meet the extraordinary burden of showing that no controversial or issuable facts or conditions existed which would have authorized the City of Lubbock's governing body to exercise

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[3] Under the ordinance the zoning districts were intended "To promote the stability of existing land uses that conform with a comprehensive plan and to protect them from inharmonious influences and harmful intrusions; To promote a harmonious, convenient, workable relationship among land uses; To encourage quality development through effective planning which utilizes modern innovations of urban design; To promote and protect the aesthetic quality of the city, by conserving and enhancing the taxable values of land and buildings throughout the city; To provide adequate light and air; To encourage proper population densities and prevent the overcrowding of structures; To provide adequate protection for community investments in water, sewerage, streets, schools, parks, and other community facilities; To promote a safe, effective traffic circulation system; To provide safety from fire and other dangers."

the discretion confided in it. In the absence of such a showing, these challenged provisions of the ordinance must stand as a valid exercise of the City's police power.

The City asserts the constitutional validity of the nonconforming use and amortization provisions of the ordinance. Lubbock Poster Company contends these provisions constitute a taking of its property without compensation and that the net effect of the ordinance is the total destruction of its business. It also maintains the provisions violate the due process and equal protection clauses of the federal constitution.

Lubbock Poster Company owns 285 billboards located on 162 sites in the City of Lubbock. The trial court found that on the effective date of the ordinance, Lubbock Poster's billboards had an average remaining useful, income-producing life in excess of 25 years, subject to normal attrition from the loss of ground site leases.

Lubbock Poster states that only two of the existing billboards conform to the location, proximity, size, separation, setback and height requirements of the ordinance. It also claims that only 36 of the remaining billboards can be altered to conform to the requirements of the ordinance. The company states that on July 19, 1975, the reasonable market value of all billboards owned by Lubbock Poster Company in the City of Lubbock which do not conform and cannot be made to conform to the provisions of the ordinance was $710,000. It alleges that the reasonable cost of altering those billboards which can be made to conform to the provisions of the ordinance is $70,000 and that the reasonable cost of demolishing or removing the billboards which do not conform and cannot be made to conform is $132,000. It says there are only seven to fifteen new billboard locations available under the ordinance. The City challenges these assertions and the trial court's findings in this regard.

Lubbock Poster Company contends that the trial court properly balanced the public's benefit under the ordinance against Lubbock Poster Company's loss and correctly held the nonconforming provisions of the ordinance to be constitutionally void. In support of its position, Lubbock Poster Company relies on City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953) and other cases antedating *Benners*.

In *Allen*, the City of Corpus Christi attempted to abate an automobile wrecking yard as a nonconforming land use under a three year amortization period. The Supreme Court held the ordinance unconstitutional as applied to the particular facts in the case and emphasized that the nonconforming use was not a nuisance per se and did not appear harmful in any respect to public health, safety, morals or welfare. The Court further held that the exercise of municipal power was unreasonable because of the small benefit to the City. However, the Court specifically stated in *Allen*:

> Our conclusion is not to be construed as a holding that the ordinance in question may not, under other circumstances, be invoked to terminate a nonconforming use, not a nuisance nor injurious to the public health, morals, safety or welfare.

254 S.W.2d at 761. In *Benners* (decided 19 years later) the Supreme Court specifically reiterated "that the conclusion there reached (in *Allen*) was not to be construed as a holding that the ordinance could not be constitutionally invoked to terminate a nonconforming use under other circumstances." The *Benners* Court also emphasized that:

> We are in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power; and that property owners do not acquire a constitutionally protected vested right in property uses once

> commenced or in zoning classifications once made. Otherwise, a lawful exercise of the police power by the governing body of the City would be precluded. (citations omitted)

City of University Park v. Benners, *supra* at 778.

The balancing of public benefit against private loss test advoated by Lubbock Poster results in unequal treatment to property owners and users similarly affected by the operation of an abatement ordinance. The public benefit, private loss and abating period factors are not conducive to definitive and quantitative balancing by the courts. The actual result under the test is that a property use with a small value and a so-called nominal loss is abated, if not accomplished too quickly, and the use with a large value or so-called substantial loss is virtually immune from abatement. In effect, a substantial loss is usually only equated with a large value. We are persuaded that *Benners* and other authorities dictate a different approach in resolving the question concerning the reasonableness of the abating period.[4]

The underlying principle of amortization is stated in City of University Park v. Benners, as follows:

> The usual approach rests on the principle that there is not a legally significant difference between existing

[4]Although the Texas appellate courts have not directly dealt with the matter of a reasonable amortization period to abate nonconforming billboard uses, the courts in a number of other jurisdictions have passed favorably upon various legislative pronouncements requiring removal of nonconforming billboards within amortization periods varying in length from one to five years. *See* Murphy, Inc. v. Board of Zoning Appeals of Wilton, 147 Conn. 358, 161 A.2d 185 (1960) (2 years); National Advertising Co. v. County of Monterey, *supra*, (1 year); Grant v. Mayor and City Council of Baltimore, 212 Md. 201, 129 A.2d 363 (Md. Ct.App. 1957) (5 years); Webster Outdoor Advertising Co. v. City of Miami, 256 So.2d 556 (Fla. Ct.App. 1972) (5 years); Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (2 to 5 years). In general, the courts concluded that ordinances and similar police power regulations requiring the conformity or removal of billboards and providing a reasonable amortization period should pass constitutional muster.

> and prospective uses in land; and that the required termination of a pre-existing land use, with allowance for recoupment, is no different in kind from restrictions upon future land use alternatives. So it is concluded that termination does not constitute a "taking" in the eminent domain sense but an exercise of the police power in the public interest...

485 S.W.2d at 777-78. Also, the Supreme Court viewed "recoupment of investment" as the major consideration in determining reasonableness by stating:

> (T)here is no difference in kind between terminating a land use which pre-dates a zoning change, with allowance for recoupment, and restricting future land uses not presently utilized. The former requires no more than that the property owner be placed in the equivalent position of the latter, i.e., that he be afforded an opportunity to recover his investment in the structures theretofore placed on the property.

Id. at 779. Under *Benners*, the property owners are placed in an equivalent position by affording them a reasonable opportunity to recoup their investment only in any structures theretofore placed on the property.

We are persuaded by *Benners* and other authorities that the pertinent factors in determining the reasonableness of the opportunity afforded Lubbock Poster Company to recoup or recover its "investment in the structures theretofore placed on the property" are the amount of its initial capital investment in the structures, investment realization at the effective date of the ordinance, life expectancy of the investment, and the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases. Modjeska Sign Studios, Inc. v. Berle, 43 N.Y. 2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977); National Advertising Co. v. County of Monterey, *supra*; and Grant v. Mayor and City

Council of Baltimore, *supra*, (dealing directly with abatement of nonconforming billboard uses by amortization). In addition we believe that removal cost should be considered by determining if the amortization period reasonably affords Lubbock Poster Company an opportunity to recoup or recover any removal cost which is directly attributable to the regulatory effects of the ordinance. However, we conclude that *Benners* necessarily precludes recoupment or recovery of the market value or any conformity cost of the structures as essential considerations in determining the question of reasonableness by requiring only that the owner be afforded a reasonable opportunity to recoup or recover his investment in the structures.

The evidence showing the amount of initial capital investment in the structures, the amount of such investment realized to the effective date of the ordinance and the amount remaining, if any, to be recouped during the amortization period, are matters necessarily within the knowledge of Lubbock Poster Company. Lubbock Poster does not point us to such evidence nor contend that the amortization period is too short to recoup its capital investment in the structures. However, in this connection, the trial court found from the evidence:

1. that the depreciation period customarily followed by Lubbock Poster Company for billboards for tax purposes ranged from 5 to 10 years;
2. that of 456 of the billboards listed on the depreciation schedules submitted with Lubbock Poster Company's 1975 United States Income Tax Return, all but 51 had been fully depreciated before the date of such return;
3. that of the 51 billboards for which the cost or basis had not been fully depreciated, 37 were acquired as of an effective report date of July 1, 1970, were being depreciated at a straight line of 20 percent rate (5 years) and were fully depreciated with the 1975 return;
4. and that the remaining 14 were acquired as of an effective report date of July 1, 1975, were being depreciated at a straight line 14 percent (7.14 years) and should be fully depreciated by January 1, 1982.

In Grant v. Mayor and City Council of Baltimore, *supra*, the party challenging the constitutional validity of an ordinance, which abated nonconforming billboard uses at the end of a five year amortization period, had claimed a five year useful life when depreciating its billboards for federal income tax purposes. The court concluded:

> A corporation that has regularly, year by year, acted in its financial affairs, under the oath of its authorized officers (and penalty of perjury), on the premise that the full useful life of its billboards is five years is handicapped seriously in arguing persuasively that legislative reliance on the same premise has done it a constitutional wrong—has taken from it substantial property without compensation—by banning the further use of those billboards.

129 A.2d at 372. To the same effect is National Advertising Co. v. County of Monterey, *supra*. We agree with the Maryland court and the California court. Lubbock Poster has or will have fully depreciated its billboards by the end of the amortization period afforded by the ordinance.

It is undisputed that the ordinance does not preclude Lubbock Poster from continuing to operate its billboards, in place, and derive revenue therefrom during the amortization period, since immediate conformity or removal is not required under the ordinance. In fact, during the amortization period, Lubbock Poster can operate its billboards in its existing non-competitive posture.

The evidence shows that Lubbock Poster normally must relocate approximately 20 percent of its billboards each year for various reasons other than the regulatory effects of the ordinance. The practical effect of the annual attrition rate would be to cause Lubbock Poster to relocate, at its own expense, and for its own reasons, a majority, if not all of its billboards, during the amortization period. In fact, Lubbock's mayor was aware of the 20 percent attrition rate and testified that he thought the six and one-half year amortization period would provide Lubbock Poster with ample time to relocate its billboards.

The evidence presented by Lubbock Poster shows there are 595 possible billboard site locations under the ordinance in zones C-4, M-1 and M-2. The evidence further shows that of this number there are 267 site locations on which conforming billboards could be placed within the City. However, Lubbock Poster says it probably could not lease 31 of the sites, that 63 would not give 350 feet of viewer visibility, that 85 do not presently have enough viewer traffic, and that 11 are located away from the main traveled right of way. It further says that of the remaining 328 of the 595 possible permitted locations under the ordinance, there is no place to build billboards on 210 site locations and 118 sites are excluded for various reasons. However, under the City's rezoning process other properties are included from time to time in the C-4 zone which enhances the availability of new locations of billboards. In essense, the evidence shows that off-premise billboards are not precluded or excluded from the City of Lubbock, even though the number of economically feasible locations may well depend on a number of factors such as future traffic patterns, development trends within the City and the willingness of Lubbock Poster to obtain leased sites by favorable economic inducements to

prospective landlords.

The trial court found that Lubbock Poster owned, in fee simple, only five billboard site locations and that all other sites "were under a standard lease form, providing for a primary term of three years and thereafter unilaterally terminable by either lessee or lessor upon required notice." In this connection Lubbock Poster does not show or contend that it has or will incur any lease expenses as a result of long term non-cancellable site lease obligations, which will extend beyond the end of the amortizaton period. However, Lubbock Poster points out that it has billboards located on lease property under the so-called three year standard lease form which have continued over a number of years dating back to the 1940's and 1950's in some instances. Lubbock Poster argues that the life span and the possibility of renewal of the lease has a compensable value, which is taken by the operative effects of the ordinance in violation of the due process clause of the federal constitution.

In support of this position Lubbock Poster relies on Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470, 35 L.Ed.2d 1, 93 S.Ct. 791 (1973). In that eminent domain condemnation proceeding by the federal government to acquire a leasehold interest, the Court concluded that the possibility of the lease might or might not be renewed was a necessary and proper consideration in determining the market value of the leasehold interest and the improvements permanently attached to the realty thereunder. However, as previously discussed, the reasonableness of the amortization period is premised on recoupment of investment in the structures rather than the recoupment of their market value. Termination of the land use by the amortization technique does not constitute a taking in the eminent domain sense.

Under the ordinance, the use of the fee title property, leasehold property and the structures are regulated, but such properties are not taken in the eminent domain sense. As we pointed out above from ***Benners***, "property owners do not acquire a constitutionally protected vested right in property uses once commenced." City of University Park v. Benners, *supra*, 485 S.W.2d at 778. The *Almota* eminent domain case is not controlling in the case before us.

Under the circumstances we must conclude that the ordinance reasonably affords Lubbock Poster Company an opportunity to recoup or recover its investment in the billboard structures "theretofore placed on the property," any removal cost directly attributable to the regulatory effects of the ordinance, and that Lubbock Poster Company has failed to meet its extraordinary burden of showing that no conclusive, or even fairly issuable facts or conditions exist in support of the exercise of the City's police power.

We also reject Lubbock Poster's contention that the challenged provisions of the ordinance are retroactive enactments as to billboards, and therefore are constitutionally void. Lubbock Poster does not have a constitutionally vested right in either the billboards, or their use, which precludes regulation under a valid exercise of the City's police power.

Lubbock Poster Company further contends that the ordinance is void under both the due process and equal protection clauses of the United States Constitution because the ordinance fails to grant any nonconforming use status to billboards, while granting such status to all other property and classes. We do not agree.

Both the federal and Texas courts have two standards of analysis in determining an equal protection challenge to state legislative enactment. If the state action invades a fundamental

right or discriminates against a suspect class, courts apply the strict scrutiny test. Otherwise, the legislation is tested under the rational relation test.

Under the rational relation test, the classification is constitutionally permissible if it is reasonable, not arbitrary and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971); Texas Woman's University v. Chayklintaste, 530 S.W.2d 927 (Tex. 1975). When, as here, no suspect catagories are involved, any rational basis may justify the classification. *See* Johnson v. Robison, 415 U.S. 361, 375 n.14, 39 L.Ed.2d 389, 94 S.Ct. 1160 (1974).

We have concluded above that the challenged provisions of the ordinance are reasonable. The chief objectives of the nonconforming use requirements are:

> (T)o prevent additions to and alterations or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder, providing for the gradual elimination of nonconforming uses of land, buildings and structures.

The nonconforming use provisions of the ordinance bear a fair and substantial relation to the objective of the ordinance. Also, all signs or billboards must conform to the ordinance or be removed by January 1, 1982. In each instance, all sign and billboard users are treated alike. We conclude that the classification does not violate the equal protection or due process clauses of the Constitution.

Lubbock Poster also attacks the billboard sections of the ordinance on the basis of the first amendment. The company

asserts that freedom of speech is abridged because the ordinance destroys billboards as a medium of communication in Lubbock. Four points of error complain of the sufficiency of the evidence supporting the trial court's finding that the billboard section does not interfere with free speech.

Although commercial speech is accorded first amendment safeguards, the manner in which commercial advertising is disseminated is subject to regulation. Bigelow v. Virginia, 421 U.S. 809, 826, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976). The Court in *Virginia Pharmacy* made clear that mere regulation of time, place and manner of advertising is acceptable if for a valid purpose and if alternative channels of communication are left open. 425 U.S. at 770-71. It is significant to note that unlike the regulation in *Virginia Pharmacy* which prohibited all advertising of prescription drugs, the Lubbock ordinance does not prohibit billboard advertising altogether. Instead, the Lubbock ordinance specifies where and in what manner this medium of advertising may be conducted.

A city's right to regulate the manner and content of speech was further clarified in Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976). In *Mini Theatres* the Court reiterated that a city's general zoning laws may require theaters to satisfy locational and other requirements by conforming to specified commercial zones. Asserting that the content of sexually explicit theaters may be used as a basis for zoning them differently from other theaters, the Court noted that a state may also regulate the content of billboards by only allowing them to advertise a nearby business. 427 U.S. at 68, n.30 *citing* Markham Advertising Co. v. State, 73

Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

Lubbock Poster argues that the Supreme Court's decision in Linmark Associates Inc. v. Willingboro, 431 U.S. 85, 52 L.Ed.2d 155, 97 S.Ct. 1614 (1977) controls the present case. We disagree. In *Willingboro* the Court voided a local ordinance prohibiting residential "for sale" signs in order to impede the flight of white homeowners from the racially integrated community. The unanimous Court found that the ordinance violated the first amendment because it prohibited certain signs based on their content. 431 U.S. at 94. By contrast, the Lubbock ordinance only seeks to regulate the time, place and manner of outdoor advertising rather than the content. *Willingboro* made clear that it was not condemning regulations of this type. As a matter of law, the billboard section of the ordinance does not abridge the first amendment guarantee of freedom of speech.

Lubbock Poster's remaining cross points contend that the ordinance jeopardizes federal highway funds and denies the company equal protection by not compensating for signs taken as required by federal and state highway beautification acts. Congress enacted 23 USC § 131 to control outdoor advertising along the interstate highway system in order to promote the safety and recreational value of public travel. The act seeks to affect its goal by requiring states to control the erection and maintenance of signs along the system under penalty of a reduction in federal highway funds. 23 USC § 131(b). Section 131(g) requires that just compensation be paid for the removal of any nonconforming signs. Texas enacted Tex.Rev.Civ.Stat. Ann. art. 6674v-1 (1969) to comply with the federal act.

Unlike the Texas act, it is apparent that the Lubbock zoning ordinance was not passed to accommodate the federal highway

beautification act. Rather than controlling signs along the interstate highway system, the Lubbock ordinance was part of a comprehensive zoning plan for the City of Lubbock. We have found no case holding that such a municipal ordinance jeopardizes federal highway funds or denies equal protection by not compensating sign owners. Moreover, numerous cases have summarily rejected such contentions. *See, e.g.*, Modjeska Sign Studios, Inc. v. Berle, *supra;* Markham Advertising Co. v. State, *supra.* It has been specifically held that federal and state highway beautification acts do not restrict a city's use of police power to terminate nonconforming signs. Art Neon, Inc. v. City and County of Denver, *supra. See also* E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970), *cert. denied,* 400 U.S. 805.

In summary, we conclude that the challenged provisions of the ordinance constitute a constitutionally valid exercise of the City of Lubbock's police power. Lubbock Poster Company's cross points one through twelve are overruled and the City of Lubbock's cross points one through six, eight and ten are sustained.

Accordingly, that portion of the trial court's judgment declaring void, and enjoining the enforcement of, the nonconforming use and amortization provisions of the ordinance is reversed, and judgment is here rendered declaring that these provisions are valid and dissolving the injunction against their enforcement; in all other respects the judgment of the trial court is affirmed.

Costs are adjudged against Lubbock Poster Company.

Carlton B. Dodson
Associate Justice

* * * * * * *

The Judgment Of The Court Of Civil Appeals

IN THE COURT OF CIVIL APPEALS
AMARILLO, TEXAS

LUBBOCK POSTER COMPANY
NO. 8875 v.
THE CITY OF LUBBOCK, TEXAS ET AL

FROM THE DISTRICT COURT LUBBOCK COUNTY
JULY 24, 1978

OPINION BY
ASSOCIATE JUSTICE DODSON

This cause came on to be heard on the transcript of the record and the same being inspected and it appearing to the court that the judgment of the Court below should be affirmed in part and reversed and rendered in part, it is accordingly ordered, adjudged and decreed that that portion of the trial court's judgment declaring void, and enjoining the enforcement of, the nonconforming use and amortization provisions of the ordinance is reversed, and judgment is here rendered declaring that these provisions are valid and dissolving the injunction against their enforcement; in all other respects the judgment of the trial court is affirmed. It is further ordered, adjudged and decreed that the appellant-appellee, Lubbock Poster Company (a partnership composed of Iva Edington and

Homer L. Hensley), as principal, and St. Paul Fire & Marine Ins. Co. as Surety, pay all costs in this behalf expended for which let execution issue and this decision be certified below for observance.

* * * * * * *

The Order Of The Supreme Court Of Texas
Refusing The Application For Writ Of Error

IN THE SUPREME COURT OF TEXAS

NO. B-7882 JANUARY 17, 1979

LUBBOCK POSTER COMPANY

vs.

THE CITY OF LUBBOCK ET AL

LUBBOCK COUNTY
SEVENTH DISTRICT

Application of petitioner for writ of error to the Court of Civil Appeals for the Seventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Lubbock Poster Company, and its surety, St. Paul Fire & Marine Ins. Co., pay all costs incurred on this application.

* * * * * * *

The Order Of The Supreme Court Of Texas
Overruling The Motion For Rehearing

IN THE SUPREME COURT OF TEXAS

NO. B-7882 FEBRUARY 21, 1979

LUBBOCK POSTER COMPANY

vs.

THE CITY OF LUBBOCK ET AL

LUBBOCK COUNTY
SEVENTH DISTRICT

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * * * * * *

APPENDIX B

HOW THE FEDERAL QUESTIONS WERE RAISED

The Pleadings In The Trial Court

NO. 80794
LUBBOCK POSTER COMPANY
vs.
THE CITY OF LUBBOCK, TEXAS
A MUNICIPAL CORPORATION, ET AL

IN THE 140TH DISTRICT COURT
OF
LUBBOCK COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

Now comes Lubbock Poster Company, a partnership composed of Iva Edington and Homer L. Hensley, hereinafter called Plaintiff, complaining of the City of Lubbock, Texas, James R. Bertram, Jerrel D. Northcutt and John L. Hill, Attorney General of the State of Texas, hereinafter called Defendants, and for cause of action shows the Court as follows:

I.

Plaintiff is a partnership composed of Iva Edington and Homer L. Hensley, both of whom reside in the City of Lubbock in Lubbock County, Texas, said partnership having its principal

place of business in the City of Lubbock in Lubbock County, Texas. The Defendant City of Lubbock, Texas, is a municipal corporation and home rule city under Article 11, Section 5 of the Texas Constitution and Article 1165 of the Revised Civil Statutes of the State of Texas. Defendant James R. Bertram is the director of the Planning Division of the City of Lubbock, Texas. Defendant Jerrel D. Northcutt is administrator of Zoning and Environmental Control of the City of Lubbock. John L. Hill, Attorney General of the State of Texas, is made a party to this law suit to comply with Section 11 of Article 2524-1 of the Revised Civil Statutes of the State of Texas.

II.

This is a suit brought by the Plaintiff for a declaratory judgment pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, commonly known as the Uniform Declaratory Judgments Act, and for a preliminary and permanent injunction under Rules 681 et seq of the Rules of Civil Procedure of the State of Texas. Plaintiff's rights and other legal relations are affected by the municipal ordinance discussed below, and Plaintiff alleges that said ordinance is invalid.

III.

Plaintiff's only business is that of standardized general outdoor advertising. This business consists of locating and purchasing or leasing land upon which outdoor advertising devices may be placed; designing, fabricating and erecting billboards; selling or donating space on the billboards for messages of advertisers, educational, political or charitable users; preparing and posting paper upon "poster panels" or "posters" or designing and painting panels for installation on "bulletins;" and engaging in constant maintenance, upgrading and replacement of structures and messages.

IV.

At all times herein mentioned, Plaintiff was and now is the legal owner of numerous outdoor advertising displays or billboards located in the City of Lubbock. Each such billboard is located on property either owned by the Plaintiff or leased by the owner thereof to the Plaintiff for the purpose of maintaining outdoor advertising billboards thereon. Each such billboard was erected in full compliance with all applicable laws of the State of Texas, the County of Lubbock, and the City of Lubbock, and is being maintained in compliance with all such laws except to the extent that there is a dispute between Plaintiff and Defendant City of Lubbock as to the validity and constitutionality of the ordinance of the City of Lubbock hereinafter specified.

(Tr. 2-3)

* * *

FIRST CLAIM FOR RELIEF

XII.

Plaintiffs incorporate by reference in this claim for relief the allegations contained in paragraphs I through XI, inclusive, of this petition.

XIII.

The ownership of and the right to use property, in this case outdoor general advertising devices or billboards, is a property right protected by the Fifth and Fourteenth Amendments to the United States Constitution and by Sections 17 and 19, Article 1, of the Constitution of the State of Texas.

XIV.

By abolishing, in effect, the right to continue to use billboards throughout the entire City of Lubbock, without payment of compensation to billboard owners, Ordinance 7084 violates the Fifth and Fourteenth Amendments of the United

States Constitution and Article 1, Sections 17 and 19, of the Texas Constitution, by taking property without payment of just compensation and without due process of law.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that the Court enter a declaratory judgment that Ordinance 7084 violates the United States and Texas Constitutions and enter judgment declaring said ordinance to be unconstitutional, invalid and void, that this Court award Plaintiff recovery of all costs herein incurred, and grant any other relief as the Court may deem proper.

SECOND CLAIM FOR RELIEF

XV.

Plaintiff incorporates in this second claim for relief the allegations contained in paragraphs I through XI of this petition.

XVI.

Plaintiff is the owner of certain parcels of land situated in the City of Lubbock, Lubbock County, Texas. One or more billboards are located upon each of said tracts. Because of the size and/or shape of some of such tracts, some of the tracts are virtually useless for any remunerative use other than as a location for a billboard.

XVII.

The ownership of and right to use property, specifically the aforementioned parcels of real estate, is a property right protected by the Fifth and Fourteenth Amendments of the United States Constitution and by Article 1, Sections 17 and 19, of the Texas Constitution.

XVIII.

The effect of the provisions of Ordinance 7084 is to make the use of some of said parcels of real estate for billboards impractical and/or illegal. By effectively abolishing the right to continue to use such land for billboards where such use is the only remunerative use of such property without payment of any compensation to the Plaintiff, as the land owner, Ordinance 7084 violates the Fifth and Fourteenth Amendments to the United States Constitution, by taking property without payment of just compensation and without due process of law.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that this Court enter a declaratory judgment that Ordinance 7084 violates the United States and Texas Constitutions and enter judgment declaring said ordinance to be unconstitutional, invalid and void, that it award Plaintiff its costs, and that this Court grant any other relief it may deem proper.

THIRD CLAIM FOR RELIEF

XIX

Plaintiff incorporates in this claim for relief the allegations contained in paragraphs I through XI of this petition.

XX.

Under Ordinance 7084 as it now exists, Plaintiff will be required by January 1, 1982, to remove more than 95% of its billboards, which will require Plaintiff to expend in excess of $425,000.00 for such removal. There would be little salvage value from the billboards and no one from whom any of these costs could be recovered. Even as to those billboards which will not be nonconforming as to zone but will be nonconforming as to other requirements imposed by Ordinance 7084 such as

set-back, separation, height or area, it will be necessary that Plaintiff either remove such billboards because of their nonconformity or alter them in their existing locations so as to make them conforming. This will require the expenditure by the Plaintiff of an amount in excess of $425,000.00.

XXI.

Ordinance 7084, by requiring that all outdoor general advertising devices be removed from C-3 districts where they are now permitted and by imposing restrictions on their use in C-4, M-1 and M-2 zoning districts which make their use in such districts impossible for all practical purposes, without payment of any compensation to the Plaintiff as the owner of such billboards, violates the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 17 and 19 of the Texas Constitution by taking property without payment of just compensation and without due process of law.

XXII.

Ordinance 7084, by requiring that the owners remove all outdoor general advertising devices in certain districts where they now exist and alter or remove such billboards in other existing locations, requires private owners to expend private funds for an allegedly public purpose without due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article 1, Section 19, of the Texas Constitution.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that the Court enter a declaratory judgment that Ordinance 7084 violates the United States and Texas Constitutions and enter judgment declaring said ordinance to be unconstitutional, invalid and void, that it award costs of court to the Plaintiff, and grant any other relief as the Court deems proper.

FOURTH CLAIM FOR RELIEF

XXIII.

Plaintiff incorporates in this fourth claim for relief the allegations contained in paragraphs I through XI of this petition.

XXIV.

Ordinance 7084, by requiring that outdoor advertising devices be removed from certain districts and either altered or removed from other zoning districts without payment of any compensation to the land owners for the losses in rental receipts the land owners will suffer, violates the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 17 and 19, of the Texas Constitution by taking property without payment of just compensation and without due process of law.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that the Court enter a declaratory judgment that Ordinance 7084 violates the United States and Texas Constitutions and enter judgment declaring said ordinance to be unconstitutional, invalid and void, that Plaintiff be awarded its costs, and that this Court grant any other relief it deems proper.

(Tr. 8-11)

* * *

SEVENTH CLAIM FOR RELIEF

XXXII.

Plaintiff incorporates in this claim for relief the allegations contained in paragraphs I through XI of this petition.

XXXIII.

In 1965, the United States enacted the Highway Beautification Act of 1965, Title 23 of the United States Code, Section

131, et seq. This Act requires states to pay just compensation for removal of billboards visible from the main traveled way of federal-aid interstate and federal-aid primary highways or suffer a penalty equaling 10% of the state's total federal highway funds.

XXXIV.

A large number of Plaintiff's billboards are located so as to be visible from the main traveled way of federal-aid interstate and primary highways, and, by Ordinance 7084, will be required to be removed without just compensation.

XXXV.

In Texas a 10% penalty would amount to a minimum of twenty-four million dollars per year. The loss of that quantity of money for highways throughout the state makes the possibility of such loss a matter of statewide concern.

XXXVI.

Following the enactment of said 1965 Act, the State of Texas enacted the Highway Beautification Act which is Article 6674v-1 of the Revised Civil Statutes of the State of Texas. Said Act permits outdoor advertising signs along the interstate and primary highway systems, in compliance with Title 23 of the United States Code, in areas in which the land use is designated industrial or commercial under authority of law or in which, though the land use is not designated industrial or commercial under authority of law, the land use is consistent with areas designated industrial or commercial. The Texas Act also requires the payment of just compensation for the removal of billboards. The purposes of the compensation provision was, among other things, to avoid the 10% federal penalty.

XXXVII.

By requiring the removal of billboards without just compensation in certain districts in Lubbock along federal-aid

interstate and federal-aid primary highways systems and in imposing restrictions in other districts which, in effect, prevent the use of billboards visible from the main traveled way of highways designated as federal-aid interstate and federal-aid primary highways, Ordinance 7084 is in conflict with the statutes of the State of Texas in a matter of state-wide concern and thereby is invalid under Article 11, Section 5 of the Texas Constitution and under Article 1165 of the Revised Civil Statutes of the State of Texas.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that this Court enter a declaratory judgment that ordinance 7084 is unconstitutional, invalid and void, that Plaintiff recover its costs herein incurred, and that this Court grant any other relief it may deem proper.

(Tr. 13-14)

* * *

TWENTIETH CLAIM FOR RELIEF

LXXVII.

Plaintiff incorporates by reference in this twentieth claim for relief the allegations contained in paragraphs I through XI of this petition.

LXXVIII.

Plaintiff shows to the Court that Section 24.4 of Ordinance 7084 provides as follows:

> "All signs or billboards which become nonconforming on the effective date of this ordinance shall be brought into compliance or removed by January 1, 1982, except as provided for miscellaneous signs in Section 23.6-2"

Plaintiff submits that the period of time allowed for making billboards conform or for removing such billboards is entirely

unreasonable and is such a short period of time that it constitutes the taking of Plaintiff's property without the payment of just compensation. Plaintiff alleges that the period of time allowed has no reasonable relationship to the normal life of such nonconforming billboards. Furthermore, the gain to the public by the removal or conformance of such billboards by January 1, 1982, is small and insubstantial compared to the large and substantial loss inflicted upon the Plaintiff by this short amortization period. To require such amortization within such a short period of time under the circumstances now existing with respect to the business and property of the Plaintiff is, in effect, to deprive the Plaintiff, as a property owner, of its property and vested rights without payment of just compensation and without due process of law and is in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 17 and 19, of the Texas Constitution.

Wherefore, Plaintiff prays, pursuant to Article 2524-1 of the Revised Civil Statutes of the State of Texas, that this Court enter a declaratory judgment that Ordinance 7084 violates the United States and Texas Constitutions and enter judgment declaring said ordinance to be unconstitutional, invalid and void, that it award Plaintiff its costs, and that this Court grant any other relief it may deem proper.

• • • • • • • •

The Points Raised In The Court of Civil Appeals

POINTS OF ERROR

POINT 1. The district court erred in failing to declare the ordinance's billboard section void because, where the practical

effect is to destroy Lubbock Poster, the ordinance is a taking without compensation and an unreasonable exercise of "police power" in violation of due process.

* * *

POINT 10. The district court erred in failing to first find and then conclude that the ordinance jeopardizes federal highway funds and subjects Texas to a 10% penalty of $25,000,000 to $34,000,000 per year of those funds, an issue being conclusively established and requiring invalidation of the ordinance.

POINT 11. The district court erred in failing to declare the ordinance's billboard section void because, where identical properties may be taken under federal and state highway beautification acts only upon payment of compensation, and no payment is made here to owners similarly situated, "equal protection" is violated.

COUNTERPOINTS

COUNTERPOINT 1. The district court correctly held that the billboard amortization provisions of the ordinance constitutes a taking of property without compensation and, therefore, is constitutionally void, because the provisions violate the "due process" and "equal protection" guarantees.

• • • • • • • •

The Points Raised In The Supreme Court Of Texas

POINT 4. The court of civil appeals erred in upholding the ordinance's billboard amortization provisions as valid, because the ordinance takes property without compensation and,

therefore, is constitutionally void, since it violates the "due process" and "equal protection" guarantees.

POINT 5. The court of civil appeals erred in holding that the amortization period is valid, because the 6-½ year period is unreasonable as a matter of law, where the period does not allow either recoupment of loss of property or relocation and, instead, takes all use and destroys Lubbock Poster.

* * *

POINT 7. The court of civil appeals erred in failing to declare the ordinance's billboard section void, because where the practical effect is to destroy Lubbock Poster, the ordinance is a taking without compensation and an unreasonable exercise of "police power" in violation of due process.

* * *

POINT 12. The court of civil appeals erred in upholding the district court's failure to find and then conclude that the ordinance jeopardizes federal highway funds and subjects Texas to a 10% penalty of $24-35,000,000 per year, an issue being conclusively established and requiring invalidation.

POINT 13. The court of civil appeals erred in failing to declare the ordinance's billboard section void, because where identical properties may be taken under federal and state highway beautification acts only by compensation, and no payment is here made to owners similarly situated, equal protection is violated.

POINT 14. The court of civil appeals erred in failing to declare the ordinance's billboard section void, because the City, deriving its "police powers" only via the state, cannot take property indirectly by zoning where the state can only take by compensation under the highway beautification acts.

REPLY POINTS

POINT 1. The recent amendments to 23 U.S.C.A. §131 by the Surface Transportation Assistance Act of 1978 now make clear that compensation is required and always has been required for removal of any billboards located near federal highways, even where removed by a city zoning ordinance.

* * * * * * *

APPENDIX C

THE LEGISLATIVE HISTORY

***House Report 95-1485, Surface Transportation Assistance Act of 1978* [*pp. 14-17*]**

95th Congress — Report
2d Session HOUSE OF REPRESENTATIVES — No. 95-1485

SURFACE TRANSPORTATION ASSISTANCE ACT OF 1978

REPORT
of the
COMMITTEE ON PUBLIC WORKS
AND TRANSPORTATION
Together With
MINORITY, SUPPLEMENTAL, AND SEPARATE VIEWS
(Including Cost Estimate of the Congressional Budget Office)
on
H.R. 11733

TO AUTHORIZE APPROPRIATIONS FOR THE CONSTRUCTION OF CERTAIN HIGHWAYS IN ACCORDANCE WITH TITLE 23 OF THE UNITED STATES CODE, FOR HIGHWAY SAFETY, FOR MASS TRANSPORTATION IN URBAN AND IN RURAL AREAS, AND FOR OTHER PURPOSES.

SECTION 116—CONTROL OF OUTDOOR ADVERTISING

Subsections (a) and (b) of section 116 would clarify existing law to make sure that just compensation is paid upon the removal of any lawfully erected sign which does not conform with the requirements for "effective control" under the Highway Beautification Act.

When the Congress enacted the Highway Beautification Act of 1965, one of the major issues was whether nonconforming outdoor advertising signs should be removed by the exercise of police power or by payment of just compensation. This matter was debated at length, and the Congress decided that just compensation should be paid, rather than removing signs by police power without payment. The requirement for payment was reinforced by enactment of the Federal-Aid Act of 1974, when the Congress provided for payment of compensation for the removal of signs that were lawfully erected under State law after October 22, 1965, and before January 1, 1968, the so-called "hiatus period." The House Committee on Public Works, in its report on the 1974 legislation, said "* * * Subsection (g) of section 131 would be amended to assure that just compensation will be paid for all signs required to be removed which were lawfully erected under State law. This amendment would eliminate the previous ambiguities by assuring that all lawfully erected signs will be treated alike."

Although the Congress made clear its intent that just compensation should be paid for the removal of all lawfully erected signs which are nonconforming under the Highway Beautification Act, this has not been the case. Sign owners and property owners are suffering substantial losses because of a recent ruling of the Federal Highway Administration.

The Federal Highway Administration issued a memorandum on December 8, 1976, to the Regional Federal Highway

Administrators which concluded that a State may not be penalized under the Highway Beautification Act for failure to have effective control of outdoor advertising when a municipality, by general zoning ordinance, provides for the removal of signs which are adjacent to interstate and Federal-aid primary highways and are nonconforming under the Highway Beautification Act, without payment of just compensation. Thus, the Federal Highway Administration has taken the position that in such instances, even though "effective control" has been conclusively determined to require the payment of just compensation, the State and its local subdivisions may refuse to pay compensation without incurring the ten percent penalty provided by the Highway Beautification Act. The employment of State or local general zoning laws or ordinances to remove lawfully erected signs that are nonconforming under the Highway Beautification Act, without the payment of just compensation, is an obvious circumvention of the compensation requirements of the Federal law. Whether signs are removed under State or local ordinance, the result is the same. Local political subdivisions of a State receive their powers from the State, whether it be from the State constitution or statutes, and or the acts of the subdivisions are the acts of the State. The State should not be able to avoid payment of just compensation by waiting for local political subdivisions to remove nonconforming signs under general zoning ordinances.

In some instances, actions have been taken to remove signs, without the payment of just compensation, which could be retained in zoned and unzoned industrial and commercial areas under the provisions of subsection (d) of section 131, title 23, United States Code. Subsection (c) of section 131 establishes the requirements for "effective control" pursuant to the

Highway Beautification Act by limiting signs, displays, and devices which may be erected and maintained adjacent to the Interstate System and the Federal-aid primary system to (1) directional and official signs and notices which conform to national standards, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices advertising activities conducted on the property on which they are located, and (4) certain landmark signs of historic or artistic significance. To promote the reasonable, orderly, and effective display of outdoor advertising, while remaining consistent with the purposes of the Highway Beautification Act, subsection (d) of section 131 permits an exemption from the "effective control" under subsection (c) for signs, displays, and devices whose size, lighting, and spacing are consistent with customary use as determined by agreement between the States and the Secretary, or by the State, county or local zoning authority, within zoned and unzoned industrial and commercial areas. State and local authorities have the discretion whether or not to implement this exemption.

If the exemption is exercised, signs which are consistent with customary use of size, lighting, and spacing may be erected and maintained in industrial and commercial areas, eliminating any removal of such signs for which just compensation must be paid. On the other hand, any signs in such industrial and commercial areas which are not consistent with customary use of size, lighting, and spacing are not eligible for the exemption from conformance with the "effective control" requirements of subsection (c) and subsection (g) of section 131 requires payment of just compensation for their removal.

If a State or local government does not exercise the exemption in subsection (d) to permit signs that are consistent with

customary use of size, lighting, and spacing to be erected and maintained, then there is no distinction between signs in industrial and commercial areas. Except for the four classes of signs permitted by subsection (c), all of the signs are nonconforming with the "effective control" requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal. It would be grossly inequitable to pay compensation for removal of signs in industrial and commercial areas which are not consistent with customary use of size, lighting, and spacing, but not pay for the removal of signs in such areas which would be consistent with such customary use except for the failure of the State or local government to exercise the exemption permitted by subsection (d).

Subsections (a) and (b) of section 116 would clarify existing law by clearly setting forth that just compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c) of section 131, title 23, United States Code.

A new subsection (o) was added to section 131 of title 23, United States Code, by enactment of section 122 (b) of the Federal-Aid-Highway Act of 1976 (Public Law 94-280), May 5, 1976. This subsection authorizes the Secretary of Transportation to approve the request of a State to permit retention of certain signs adjacent to interstate and Federal-aid primary highways where the State demonstrates that such signs provide directional information about goods and services in the interest of the traveling public and that the removal of such signs would work a substantial economic hardship in a specified area defined by the States. Actions taken by the States to implement this subsection have revealed the desirability of two changes.

It is discretionary with each State whether or not to submit requests for retention of such signs. If a State elects to utilize this subsection and submits requests which are in full compliance with the Federal law, the State should be assured of the Secretary's timely approval. However, under existing law, the Secretary may withhold his approval of any, or all, requests of a State, even though the requests meet all of the requisites enunciated by Congress. It is recommended that the word "shall" be substituted for "may" with respect to the Secretary's approval of such State's requests.

By enactment of subsection (o), Congress intended to provide relief from the creation of substantial economic hardship in specific areas, which would result from the removal of certain directional information signs. However, many areas that should be eligible to benefit from this provision are precluded therefrom because the present law requires that the directional information signs be located within the geographic limits of the specific economic hardship area. It is not uncommon for enterprises to be located some distances from the interstate and Federal-aid primary highways which are traveled by the public to whom they offer their goods and services upon whose patronage their economic well-being is dependent. This situation exists, for example, where highways have bypassed towns, where businesses are located along access-controlled highways and some distances from the interchange that provides access to their establishments, and where natural and other attractions are not in close proximity to the highway. In such instances, measurable substantial economic hardship, such as the loss of sales, income, and jobs attributable to the removal of directional information signs, may impact a specific area with geographic limits that do not extend to the sites of such signs along the highway. To make

subsection (o) realistic and workable, it is recommended that the subsection be amended to delete the language that only directional information signs located within the geographic limits of the specific economic hardship area may be retained.

Subsection (c) of section 116 would amend subsection (o) of section 131, title 23, United States Code, to carry out these two recommendations.

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Joint Conference Committee Report Of The House And Senate Adopting HR 95-1485 [pp. 2, 14, 91]

95th Congress — Report

2d Session HOUSE OF REPRESENTATIVES — No. 95-1797

SURFACE TRANSPORTATION ASSISTANCE ACT OF 1978

October 14, 1978—Ordered to be printed

Mr. Howard, from the committee of conference, submitted the following

CONFERENCE REPORT

(To accompany H.R.11733)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 11733) to authorize appropriations for the construction of

certain highways in accordance with title 23 of the United States Code, for highway safety, for mass transportation in urban and in rural areas, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Surface Transportation Assistance Act of 1978."

TITLE I

Short Title

Sec. 101. This title may be cited as the "Federal-Aid Highway Act of 1978."

* * *

CONTROL OF OUTDOOR ADVERTISING

SEC. 122. (a) Subsection (g) of section 131, title 23, United States Code, is amended by striking the period at the end of the first sentence and adding the following "and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section.".

(b) Subsection (k) of section 131, title 23, United States Code, is amended by striking the first word and inserting in lieu thereof the following: "Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing.".

(c) Clause (3) of subsection (c) of section 131 of title 23, United States Code, is amended by inserting immediately after "devices." the following: "including those which may be changed at reasonable intervals by electronic process or by remote control.".

(d) Subsection (j) of section 131 of title 23, United States Code, is amended by inserting immediately after "agreement" at the end of the first sentence, the following: "Provided, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder.".

* * *

CONTROL OF OUTDOOR ADVERTISING

House Bill

Subsections (a) and (b) of this section would clarify existing law by clearly setting forth that just compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c) of section 131, title 23, United States Code.

Subsection (c) amends subsection (o) of section 131 of title 23 to require the Secretary to approve State requests to retain directional signs erected lawfully under State law and to remove the limitation that only directional information signs located within the geographical limits of a specific economic hardship may be retained.

Senate amendment

The senate amendment requires that compensation must be paid for the removal of signs which have at no time conformed to Federal beautification standards, regardless of the reason for their removal.

States may, however, impose stricter limitations on outdoor advertising than those established in the Highway Beautification Act. In which case, the Federal requirement for compensation would not apply.

Conference substitute

The Conference agreement accepted the House language on compensation and struck all references to the economic hardship provision amendment contained in the House bill.

The conferees agreed not to amend subsection (o) of section 131 in the absence of experience that can be gained through its adequate implementation. When enacting subsection (o) in 1976, the Congress intended that it be administered by the Secretary in a meaningful way and that he approve the requests of States for the retention of signs, displays, and devices whenever the requests meet the requirements set forth in the subsection. The conferees emphasize that we expect the Secretary to expedite the implementation of subsection (o) to carry out this Congressional intent and to assist those States which desire to utilize its provisions in doing so.

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